# SELECTIONS FROM THE RECORDS

OF THE

# MADRAS GOVERNMENT.

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Class XI
Book-case 2

## COLLECTIONS OF DECREES

ILLUSTRATING IN SOME MEASURE

## THE MUTUAL RIGHTS

OF

## LAND-HOLDERS AND TENANTS

IN

## MALABAR.

No. XLIX.

401

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*From* J. D. SIM, *Esq., Acting Secretary to the Board of Revenue; to* H. FORBES, *Esq., Acting Secretary to Government Revenue Department; dated Fort Saint George, 18th March* 1857, *No.* 840.

SIR,

With reference to para. 4 of Extract from Minutes of Consultation, dated 21st January 1856, Revenue Department, No. 69, I am directed by the Board of Revenue to submit herewith a letter from the Deputy Register to the Court of Sudder Udalut, dated 22nd January 1857,* forwarding a collection of decrees illustrating in some measure the mutual rights of landlords and tenants in Malabar.

* *In Cons.* 18*th March* 1857, *No.* 367.

2. The Board recommend that these decrees may be published as a No. in the "Selections from the records of the Madras Government," or separately in the form of a Pamphlet for distribution in such manner as the Government may see fit.

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ORDER THEREON, *No.* 411; *dated 2nd May* 1857.

1. With the letter above recorded, the Board of Revenue submit a number of decrees selected by the Sudr Court of Udalut in illustration of the mutual rights of landlord and tenant in Malabar.

*Para.* 4.

2. It was proposed in an Extract from the Minutes of Consultation dated the 21st of January 1856, No. 69, that such a Collection should be published as a guide to the local Courts and the Revenue officers in the decision of cases arising between landlord and tenant, in which hitherto, the peculiar customs of Malabar have not been sufficiently kept in view.

*From Govt. to Bd. of Rev. 23rd August* 1853.
*Proceedings Bd. of Rev. 5th Sept.* 1853.
*Do. Do. 20th March* 1854.
*From Govt. to Bd. of Rev. 27th April* 1854.
*Do. Do. 20th do.* 1854.
*Proceedings Bd. of Rev. 22nd Dec.* 1855.
*Ex. Minutes Consultation 21st Jan.* 1856.

3. The matter has been fully discussed in the papers marginally noted, and it only remains for Government to order that the Collection of decrees now submitted be published as a selection from the records of Government.

(Signed) H. FORBES,

*Acting Secretary to Government.*

MADRAS RECORD OFFICE

# COLLECTIONS OF DECREES, ETC.

## DECREE OF THE CIVIL COURT, ZILLAH CALICUT.

*Original Suit No.* 142 *of* 1849, *on the file of the Mahomedan Sudr Ameen Chakalakel.*

Chatoo Nair.

*versus*

1. Aliyote Ashary Chunden, *alias* Imbichoony.
2. Chakalakel Ittirarapen.

*The 2nd defendant by Vakeel,* Sheshan Putter.

*Appeal Suit No.* 169 *of* 1851, *on the file of the Civil Court Chakalakel.*

Chatoo Nair.

*versus*

1. Aliyote Ashary Chunden, *alias* Imbichoony.
2. Chakalakel Ittirarapen Nair.

1. In original suit plaintiff sought to recover possession of a paramba yielding annually 37 old fanams and cadjans, and of a hut standing thereon, on his paying to 1st defendant the sum of $4\frac{1}{4}$ fanams, being the balance of a mortgage claim of $45\frac{1}{2}$ old fanams held by the latter over the property, after deducting $41\frac{1}{4}$ fanams for the rent of the same in arrears (with the exception of certain payments admitted) from 1022 (1846-7) to 1024 (1848-9), and rupees $4\frac{1}{4}$ the value of the hut, in all rupees 5-5-0, with further rent up to the date of decree.

2. His plaint set forth that the paramba in question had been in the possession of his family since 945 (1769-70) when his ancestor Kelloo Nair got it on mortgage from the proprietors. That since he had inherited the family property he had renewed 1st defendant's mortgage deed above alluded to, and that 1st defendant having for some time failed to pay his rent or to do justice to the property in the way of improvements, he was not willing that the paramba should remain any longer with him.

3. 1st defendant denied plaintiff's right to the land, pleading, that he (1st defendant) held it from Ittirarapen Nair, with whom he had

renewed a deed formerly renewed by him with Chatoo Nair, Ittirarapen's predecessor in the property, and which related to a claim obtained by his father from the said Chatoo Nair.

4. 2nd defendant, Ittirarapen Nair above alluded to, upheld 1st defendant's assertions as to the renewal of his deed, claiming to be Chatoo Nair's heir, and denying plaintiff's right to that title.

5. The moofty sudr ameen was of opinion, that plaintiff had sufficiently established the fact of 1st defendant having renewed his deed with him in Khanny 1022 (September, October 1846), Chatoo Nair (his and 2nd defendant's karnaven) having demised in 1021 (1845-6), and that there was evidence to shew that the kanom right over the paramba was plaintiff's and not 2nd defendant's, and he, therefore, adjudged 1st defendant to pay to him the sum of rupees 115-15-0, being the rent of the same from 1022 (1846-7) up to the date of decree, together with the rent that might thereafter accrue; but because he had failed to prove that 1st defendant had not made improvements in the property, he non-suited him as far as the restoration of the property was concerned, on the ground that twelve years had not elapsed since the renewal of the deed; and further decreed that all parties should bear their own costs.

6. Dissatisfied with so much of this decision as refuses him possession of the paramba and taxes him with costs, plaintiff now appeals, submitting that the original decree is opposed to the kanom and jemom rules obtaining in Malabar, and to the general practice of the courts. The former, he contends, allow a proprietor to redeem his lands at any time he pleases, and the latter in cases like the present permits arrears of rent to go in liquidation of the mortgage claim. He further complains that though the sudr ameen admits the falsity of the defendant's assertions, and decrees in his (appellant's) favor, he taxes him with costs as if he had lost his cause.

7. 1st respondent fails to answer.

8. 2nd respondent in answer, excuses his having omitted to appeal, on the plea that the original decree does not go against him, and pleads as a flaw in the case that the jenmee was not made a party to it.

9. The civil judge is of opinion, that in retaining 1st defendant in possession of the property on the grounds set forth in his decree, the moofty sudr ameen has decided wrongly. It is true that precedents are to be met with for securing twelve years possession to a tenant from the renewal of his mortgage deed, but they do not apply to cases like this where the tenant has failed in his engagements and allowed rent to run into arrears. He is also of opinion, that plaintiff is fairly entitled to his costs, and such being the case, he has no hesitation in reversing

those parts of the original decree against which the plaintiff has appealed, and adjudging that appellant be put into possession of the property sued for, his mortgage debt and the price of the house being first deducted from the arrears of rent, and that defendants do bear plaintift's costs of suit as well as each his own, or in confirming so much of it as awards payment of that portion of the rent which remains due after these deductions have been made. But at the same time he thinks it necessary to observe, that he does so simply on the grounds that the presumptions of the case favor plaintiff's right, and that 1st defendant by renewing with him after Chatoo Nair's demise, must be considered as having admitted his title to the property, and is therefore bound by the conditions of his lease to restore it to him; but that nothing in this decree is to be taken as in any way pronouncing authoritatively on the question of plaintiff or 2nd defendant's title to inherit Chatoo Nair's property, that point being one the issue of which obviously cannot be tried in the present case. He would also observe, with reference to 2nd respondent's objection put forth in his appeal answer, that he sees no reason whatever why the jenmee should have been made to defend the suit, or how his rights are in any way compromised, or even called in question by it.

## DECREE OF THE CIVIL COURT, ZILLAH CALICUT.

*Original Suit No. 23 of* 1850, *on the file of the Subordinate Court.*

Karaka Koomaren Ramen, *alias* Kavulpara Nair.

*By Vakeel* Govina Paniker, and subsequently Amboo Podwall.

*versus*

I. Vadakemadatil Rama Krishna Putter's son, Ananda Naraina Putter.

*By Vakeel* Venguideshwarayen.

*Supplemental.*

2. Kodapoorata Padingaremadatil Venguida Krishna Putter's son Venguideshwara Putter.

*Appeal Suit No.* 16 *of* 1852, *on the file of the Civil Court.*

Karakat Koomaren Ramen, *alias* Kavulpara Nair.

*By Vakeel* Sooria Naraina Shastry, and subsequently Sawmynathaiyen.

*versus*

1. Vadakemadatil Rama Krishna Putter's son, Ananda Naraina Putter.

2. Kodapoorata Padingaremadatil Venguida Krishna Putter's son, Venguideshwara Putter.

1. The object of the original suit was to recover possession of certain property, with balance of rent, on payment of mortgage.

2. The plaint set forth that mutual deeds were executed between the plaintiff and 1st defendant on 13th Vrischigom 1021 (26th November 1845), whereby one of plaintiff's parambas being mortgaged to the 1st defendant for 100 fanams, a certain rent was made payable monthly, and in default of payment, restoration to be made. The plaintiff proceeded to state that up to the 6th Koombhom 1024 (15th February 1849), the rent had been only partly paid, he accordingly sued 1st defendant for the balance due and recovery of the property, on payment of the mortgage and the value of the sheds thereon.

3. In defence it was contended that the rent had been duly discharged up to 13th Magarom 1024 (24th January 1849), and receipts obtained, but that plaintiff's kariasten (agent), Parangodasha Menon, had fraudulently obtained possession of them. The 1st defendant further pleaded that no such penalty attached to the non-payment of rent regularly.

4. The 2nd defendant allowed the trial to proceed *ex parte*.

5. The subordinate judge in his decision observes, that no reliance could be placed on the evidence adduced on plaintiff's behalf; that there

were good grounds for believing that the 1st defendant had been defrauded, and no ground for disturbing him in his possession so long as he conformed to the terms of his agreement with plaintiff, on these grounds the subordinate judge dismisses the suit with costs.

6. In appeal the plaintiff contends, that proof has been adduced that the rent had fallen into arrear, and that 1st defendant was bound to deliver up the property. The 1st defendant's reference to Parangodasha Menon, who had not been the plaintiff's agent, and the Tahsildar's report in the matter, the appellant describes to be false and collusive. The appellant takes exception to the testimony offered on 1st defendant's behalf.

7. The 1st respondent in answer upholds the original decision.

8. The 2nd respondent appears to have been unnecessarily included in the action.

9. The civil judge having perused the record of the case, and by the desire of the parties referred to the collector on the subject matter of defendant's exhibit marked No. 3, is of opinion that the evidence offered on the plaintiff's behalf relative to the rent being in arrears is not trustworthy. The 5th and 6th witnesses vary in their account, as does the 1st witness from the 5th. The remaining two witnesses examined on plaintiff's behalf are ignorant of this matter.

10. The civil judge does not consider that 1st defendant has satisfactorily proved that besides the 100 fanams mortgage an additional sum of 700 fanams was received from him by way of present, but the oral and documentary evidence adduced on his behalf, confirmed as it is by the reply of the collector to the court's reference on the subject of Parangodasha Menon having had the superintendance of the plaintiff's affairs, satisfies the court that the rent was not in arrear up to the time when the dispute arose.

11. On the above grounds the civil judge confirms the original decision, and assesses the appellant with all costs, with the exception of those incurred in serving process on the original 2nd defendant, which will be paid by the 1st defendant, at whose instance the 2nd defendant was made a party to the action.

# DECREE OF THE SUBORDINATE COURT, ZILLAH CALICUT.

*No.* 297 *of* 1842 *on the file of the Chowghat Moonsiff.*

Edapamvittil Komasha Nambiar.

*versus*

1. Peroomballypata Mamy and four others.

For the restitution of two parambas and a nursery ground yielding an annual income of 25 fanams.

*Appeal Suit No.* 103 *of* 1844 *on the file of the Civil Court.*

Peroomballypata Mamy.

*versus*

1. Edapamvittil Komasha Nambiar and two others.

For the reversal of a decision of the Chowghat Moonsiff, disallowing to appellant the sum of fanams 522 and 8 vishoms, being the sum of his claims on the property for mortgage money and value of improvements, and for a decree awarding the same.

1. The plaintiff represented that the 2nd and 3rd defendants had a mortgage on the property in question which had been absorbed by arrears of rent accruing, and by their non-discharge of a bond executed by them for part of the mortgage money; that thus all that remained of claim to them on the property was the value of the improvements made thereon; and that he (plaintiff) had cleared off the same, and obtained a mortgage on the property from the 4th defendant who was the proprietor thereof, on the strength of this mortgage the plaintiff sought to obtain possession.

2. The 1st defendant resisted the suit by pleading, that he held the property on sub-mortgage from the 2nd and 3rd defendants; that the claim for re-imbursement for improvements belonged to him; and that the value thereof far exceeded what had been named in the plaint.

3. The 2nd, 3rd, and 4th defendants supported the plaintiff.

4. The moonsiff was of opinion, that as the 4th defendant (the proprietor) had apparently never been made cognizant of the sub-mortgage pleaded by the 1st defendant, the sum thereof could not be assured to him on the land, but must be left to be recovered by him from the 2nd and 3rd defendants, if in truth it had been advanced to them; and as re-imbursement for the improvements seemed to be due to 1st defendant, the plaintiff was required to pay him the same, according to a valuation made by an ameen deputed to estimate them.

5. The 1st defendant appeals, insisting on the existence of his right of sub-mortgage, and stating that the improvements were worth 300 fanams more than had been allowed him in the decree.

6. The appellant has offered nothing in opposition to the moonsiff's grounds for refusing to admit the liability of the property for the sum of the sub-mortgage pleaded by him.

7. The Court is of opinion, that the moonsiff's decision is in conformity with the customs of the country, which make it necessary for the security of a sub-mortgagee that he should make known his claims to the proprietor. By not doing so, he renders himself liable to have his claim overlooked, on a settlement occurring between the proprietor and the superior mortgagee, and for this the proprietor could of course not be held answerable.

8. Further, as the existence of the superior mortgage depends upon the rent being regularly paid, the sub-mortgagee should moreover assure himself by obtaining receipts for the rent from the proprietor. This the appellant omitted to do, and consequently, as remarked by the moonsiff, he has no means of shewing that the superior mortgage held by the 2nd and 3rd defendants has not been absorbed.

9. With regard to the value of improvements, appellant, in his appeal petition, did not specify in what respect the ameen's estimation thereof was incorrect. On questioning him thereupon it appears that he has no valid ground of objection to make thereto. The particulars of the improvements, he allows have been correctly entered, and the rates of valuation are such as are customarily adopted.

10. The court therefore dismisses this appeal.

## DECREE OF THE SUBORDINATE COURT, ZILLAH CALICUT.

*Original Suit No. 374 of 1848 on the file of the Ernad Moonsiff.*

Pariengat Padinharepaat Pirooga Panikar.

*versus*

1. Paralakattodyil Mamod Cooty and four others.

*Appeal Suit No. 164 of 1852 on the file of the Civil Court.*

Pariengat Padinharepaat Changoo Panikar.

*versus*

Pariengaat Padinharepaat Perooga Panikar.

1. The original suit was instituted for the restoration of seven lands, yielding a patom of 125 fanams, the jenm property of the cherootee kovil devasom, and assigned by the Ooraler thereof, the deceased Tapoo Panikar, to the three first defendants' father, Abdoolla Cootty, in the month of Mithonom 1012, upon kanom, for fanams 350. The plaint set forth that in the month of Karkadom 1016, the plaintiff obtained the aforesaid lands, together with other lands and parambas, from the said Ooraler of the devasom upon melkanom, for fanams 5,200. That plaintiff then was put in possession of part of the property, and several enucks were granted to him to the address of eight different tenants, who refused to accept them. That of these enucks, one was addressed to the aforesaid Abdoolla Cootty, and plaintiff accordingly instituted original suit No. 92 of 1846, for restoration of the land. That in this suit the moonsiff passed a decree to the effect that he (plaintiff) should institute suits for the restoration of all the lands mentioned in his kanom deed, and dismissed that suit. The plaintiff therefore instituted the original suits Nos. 375 of 1848, and 366 to 369 of 1851. Appeal Suit Nos. 165 of 1851, and 166 to 169 of 1852, and this suit, which last is for the restoration of seven lands and recovery of arrears of patom from 1017 to 1023, parras 155 and 4 edungalies of paddy, or the value of the same, fanams 155-$\frac{6}{16}$, the same to be deducted from the kanom of fanams 350 and the balance paid to defendants.

2. Abdoolla Cootty having deceased, the first three defendants were included as his heirs.

3. The 4th and 5th defendants are nephews of the deceased Tapoo Panikar, the former Ooraler of the devasom.

4. The 1st and 4th defendants *ex parte.*

5. In their answers the 2nd and 3rd defendants traversed the plaint, stating that the lands sued on as well as others were obtained from the deceased Tapoo Panikar and 5th defendant's karnaven upon kanom and paromkadom for fanams 3,625 ; that while so holding the property, the 5th defendant's karnaven died, and the documents were renewed with the 5th defendant in the month of Karkadom 1019, that 5th defendant is the karnaven of the plaintiff's tarwad, and while he is in existence the plaintiff has no right to sue.

6. The 5th defendant supported the above, adding that all the tarwad affairs were managed by him.

7. The plaintiff filed seven exhibits, and six witnesses were examined for him.

8. The 2nd and 3rd defendants filed two documents, and two witnesses were examined for them.

9. The 5th defendant filed one deed, and six witnesses were examined for him.

10. The moonsiff brought the case to issue upon the point whether the documents Nos. 1 and 2 (No. 1 the melkanom deed for fanams 3,500 and paromkadom deed for fanams 1,700,) was granted by the deceased Tapoo Panikar, and whether the kanom held by Abdoolla Cootty was fanams 350, or whether it is, as asserted by defendants 2nd and 3rd and 5th, that the former held the lands upon kanom and paromkadom for fanams 2,625.

After a resume of all the evidence he was of opinion, that the defendants had failed to prove their assertions, while on the other hand the plaintiff had fully proved the assignment of the lands to him upon melkanom, he therefore awarded restoration upon payment of kanom less porapaad due, costs against the first three defendants.

11. The 5th defendant appeals. He urges in opposition to the original decree that by it the moonsiff confirmed the plaintiff's melkanom deed for fanams 5,200, when the suit was instituted only for restoration of the lands. He also alludes to the exhibit No. 8 filed by plaintiff, a kanom deed granted by 5th defendant's tarwaad to the Kollatoor Warier, stating that it is signed by plaintiff and the deceased Tapoo Panikar, while the melkanom deed filed by plaintiff is signed by Tapoo Panikar alone.

12. Respondent answered.

*Decree.*

13. The court, upon careful consideration of the proceedings in this case and the grounds upon which the moonsiff decreed restoration

of the lands to the plaintiff, is of opinion that the evidence was not such as to justify a restoration of the lands.

14. It was manifestly necessary to the plaintiff, to establish the melkanom deed said to have been granted by the deceased Tapoo Panikar, the Ooraler of the devasom; this was admitted by the moonsiff, and in his decree he stated that it had been proved, the moonsiff had no jurisdiction in this matter, the document being beyond the value cognizable by his court.

15. It would have been altogether different had the mortgagee sued for restoration backed by the manager of the devasom, but here the present Ooraler objected to the document, and the koodians also traversed it, pleading that they held the property by renewed deed from the 5th defendant. It appears to the court, therefore, that restoration should not have been granted until the plaintiff had proved his mortgage over the lands to the extent set forth by him; had this course been pursued, the moonsiff would not have adjudicated upon a claim beyond his jurisdiction, for it is clear his decree affirms that melkanom deed.

16. The plaintiff, and 4th and 5th defendants are all of one tarwaad, and each in their turn may succeed to the office of Ooraler of the devasom; it appears to the court rather suspicious that this melkanom deed should have been granted by the deceased Ooraler just a month or so before his death, the 5th defendant contends he was incapacitated from business for a year previous to his death.

17. There are two grounds, in the court's opinion, therefore, for reversing the moonsiff's decree. First, his court had no jurisdiction to consider the authenticity or otherwise of the deed upon which the plaintiff based his suit, and 2nd, until this was done, to decree restoration was improper.

18. As a general rule, the court is of opinion, that it would form a dangerous precedent to award restoration of lands at the suit of a kanomkar, unless he held in his hands the express sanction of the jenmkar setting forth that the mortgage had been made.

19. Here, however, the very granting of the melkanom deed by the deceased Tapoo Panikar appears to the court open to suspicion, and it is now disputed both by 2nd and 3rd defendants and the 5th defendant, the present manager of the devasom. The court is further of opinion, that it would be hard to compel the jenmkar to come forward to disprove the melkanom deed after the lands were restored upon its having been proved to be authentic by the moonsiff.

20. The court, therefore, considers the proper course to be to reverse the decree awarding restoration, leaving it to the plaintiff to file

a suit against the devasom for the recognition of his melkanom deed No. 1, and for recovery of all costs incurred by him, that document having been established by a regular suit in a court competent to deal with it, the plaintiff will then be in a proper position to sue for restoration of the lands.

21. The original decree is reversed, and plaintiff's case dismissed, and respondent assessed with costs both of original and appeal suits.

## DECREE OF THE SUBORDINATE COURT, ZILLAH CALICUT.

*Original Suit No.* 318 *of* 1851, *on the file of Betutnad Moonsiff.*
Irombayee Valiavittil Chatoo Nambiar.
*versus*
1. Vellayil Narainen Namboodry and seventeen others.

*Appeal Suit No.* 76 *of* 1854, *on the file of Civil Court.*
Ramah Variar.
*versus*
1. Chatoo Nambiar and five others.

*Appeal Suit No.* 77 *of* 1854, *on the file of Civil Court.*
Ravoony Nair.
*versus*
1. Chatoo Nambiar and eight others.

*Appeal Suit No.* 80 *of* 1854, *on the file of Civil Court.*
Narainia Numboodripad.
*By Vakeel* Mamoo Koya.
*versus*
1. Chatoo Nambiar and two others.

*Appeal Suit No.* 81 *of* 1854, *on the file of Civil Court.*
Vickareh Panikur.
*By Vakeel* Mamoo Koya.
*versus*
1. Chatoo Nambiar and two others.

*Appeal Suit No.* 83 *of* 1854, *on the file of Civil Court.*
Krishna Menon.
*By Vakeel* Amboo Padwall.
*versus*
1. Chatoo Nambiar and three others.

*Appeal Suit No.* 87 *of* 1854, *on the file of Civil Court*
Vassoony Nambidy.
*By Vakeel* Mamoo Koya.
*versus*
1. Chatoo Nambiar and two others.

1. The original suit was instituted for the recovery from the 1st defendant of fanams $548\frac{8}{16}$ being arrears of porapad up to date of plaint due on certain landed property, 20 in number, the jenm property of three devasoms, and assigned by the 1st defendant the samoodayom of the devasoms to the 3rd defendant in the month of Kany 999 for fanams

500, the kanomkar stipulating to pay a porapad after deducting interest upon the kanom and the nigoody of $66\frac{3}{20}$ parras of paddy and 1 fanam. This porapad was paid up to the month of Kany 1020, but not subsequently, and accordingly the 1st defendant re-assigned all the aforesaid property in Medom 1024 to the plaintiff upon melkanom for fanams 550, and received from him the arrears of porapad due to 1024, in all fanams $548\frac{8}{16}$, granting yennuch to the 2nd defendant to restore the property and deal with the plaintiff. The 2nd defendant having refused to accept the yennuck, the plaintiff sued accordingly for recovery of arrears and restoration of the lands.

2. The 1st defendant answered supporting the plaint.

3. The 2nd defendant in his answer disputed the right of the 1st defendant to transfer the property upon melkanom to the plaintiff, pleading that they were, with the exception of Nos. 11 and 12, held by his tarwad for a long period of years upon a kanom of fanams 500, that this kanom lien was subsequently attached and sold in satisfaction of the decree passed in original suit No. 318 of 1823 against 2nd defendant's karnaven, and purchased by one Potteykat Ramen Menon : subsequently, this kanom was purchased from Ramen Menon by Ittykoomarapa Menon, from whom the 3rd defendant in the year 1011 obtained it, and renewed the deed with Ooralers, the 4th and 5th defendants to hold the same in perpetual tenure, and that the porapad has been duly paid to the devasom up to 1024.

4. The 3rd, 4th, 5th, 6th, and 7th defendants answered, supporting the 2nd defendant's answer. The 4th and 5th defendants adding, that the 1st defendant had no authority to transfer the lands pertaining to the devasom.

5. The 10th defendant answered, stating that of the land No. 3, six plots, of No. 9, four plots, and of No. 11, two plots, are his own jenm.

6. The 12th defendant put in answer, stating that 24 kandoms of lands assigned to the devasom by the Zamoorin Rajah as a religious offering are included in the boundaries of the plaint lands.

7. The 16th defendant supported this answer.

8. The 13th, 14th, and 18th defendants also answered that their own jenm lands were included in these plaint lands.

9. The 8th, 9th, 11th, and 17th defendants were *ex parte*.

10. The plaintiff filed two exhibits, *A*, melkanom deed, *B*, yennuck, and named five witnesses, two of whom were examined.

11. The 1st defendant filed one exhibit, No. 1, maroopatom chit.

12. The 3rd defendant filed one exhibit, No. 2, sunnud.

13. The 6th and 7th defendants filed three exhibits, No. 3, document granted by 1st defendant's father; No. 4, a letter written by 1st defendant to 7th defendant regarding pagoda affairs; No. 5, copy of decree in original suit No. 485 of 1827.

14. The 16th defendant filed two exhibits, No. 6, old tirooweytoo deed dated 970, No. 7, teer deed for 24 fanams, dated 1006.

15. The moonsiff found that it was generally admitted by all the defendants who have answered that the lands were held upon kanom of fanams 500 by the 2nd defendant, and that 1st defendant was the samoodayom of the devasom, and as such had filed suits and obtained decrees; that no one had filed a suit at any time to cancel his authority; that his father was samoodayom prior to the invasion of Malabar by Tippoo Saib, and that since 985 the 1st defendant had conducted the affairs of the devasom. He therefore upheld the transfer upon melkanom to the plaintiff, and directed the 10th, 12th, 13th, 14th and 18th defendants to institute new suits for the recognition of their rights said to be involved in this transfer. He, however, recognized the 16th defendant's royal grant, No. 6, and with the exception of the 6 kanoms mentioned in it, he awarded restoration of the remaining lands. The 3rd defendant to pay arrears of porapad from Toolaur, 1020, the plaintiff to pay the 3rd defendant's kanom and value of improvements, rupees 38-13-3. The 3rd defendant to pay the plaintiff and 1st defendants, the remaining defendants their own costs.

16. From this, the 12th defendant under appeal suit No. 76, the 13th defendant under appeal suit No. 77, 14th defendant under appeal suit No. 80, 18th defendant under appeal suit No. 81, 3rd defendant under appeal suit No. 83, 10th defendant under appeal suit No. 87, appealed. These appellants all appeal against that part of the decree deciding them to bring new suits for the recognition of the lands said to be their own jenm property, and included in the boundaries of the plaint lands. The 3rd defendant against the transfer of the lands to the plaintiff.

17. The plaintiff and 1st defendant, or 1st and 2nd respondents in appeal suit No. 83 answered.

*Decree.*

18. The only points for consideration in appeal are.

1st. Is there sufficient evidence on record to shew that 1st defendant as samoodayom had authority to grant these lands on melkanom to the plaintiff.

2nd. Are the lands or other portion of the lands claimed by the 10th, 12th, 13th, 14th, and 18th defendants as their own jenm, included within the boundaries of the plaint lands. As regards the first point the

court finds that the 5th defendant (Ooraler) admitted in his deposition that 1st defendant had assigned lands and had instituted suits and obtained decrees in the capacity of samoodayom, nor had he ever been dispossessed of this office. It further appears that 1st defendant's father was samoodayom prior to the period of Tippoo's invasion, and that since the year 985 the 1st defendant has conducted the affairs of the devasom.

19. Such being the case, it only remains to ascertain if as samoodayom, he has authority to assign the lands upon melkanom to any one, be the kanomkar who he may, and upon this point the court holds that he has this authority necessarily for the protection of the interests of the devasom, while so, it mattered not whether the kanom was in the 2nd or 3rd defendant's possession so long as the melkanomkar was directed to pay the amount of their kanom lien.

20. The 3rd defendants appeal, consequently, on this point, cannot be sustained as regards the 10th, 12th, 13th, 14th, and 18th defendants; the court, on reference to the moonsiff's decree, finds that he recorded points for them to establish their allegations, they failed to do so, hence the moonsiff was justified in decreeing as he did. They may yet do so if they please, neither the original or appeal decree barring them instituting new suits against the 1st defendant and plaintiff.

21. The court, however, is not satisfied with the proof upon which the moonsiff excepted the six kandoms mentioned in the royal grant as forming portion of the land called Chekarreh Nillom, No. 17.

22. The moonsiff says the document "appears a very old one," but this is not sufficient, and does not justify his excepting these 6 kandoms. With this modification, the court affirms the original decree, dismissing these appeals with costs against the appellants.

## DECREE OF THE SUBORDINATE COURT, ZILLAH CALICUT.

*Before the District Moonsiff of Ernad, Original Suit No.* 104 *of* 1853.

*Before the Civil Court of Calicut, Appeal Suit No.* 398 *of* 1854.

*Appellant,* Mana Vikrama Zamorin, Rajah of Calicut.

*Vakeel,* Sehshom Putter.

*versus*

*Respondent,* Varia Kallatil Tenjeny Ittichery (female).

1. This suit was brought to recover possession of two parcels of land granted on a kanom of 15 rupees, formerly to the husband of defendant, and in 1026 by a new document to the present defendant. The ground of asking the return of the land was the alleged non-payment of mitcharom in 1028, and the other ground, the alteration of a boundary which existed between the land now sued for and defendant's, and the cutting of a channel on the western side of No. 1 parcel.

2. The defendant utterly denied that the mitcharom was due, alleged payment of rupees 60 on the renewal of her kanom claim, and denied that she had either altered the boundary or cut the vaireal.

3. The moonsiff observed, that it was clear that no mitcharom was due, that the defendant had produced a receipt confessedly bearing the signature of plaintiff's caryasten. The plaintiff's own witnesses were clear upon this point, for they plainly admitted the signature to be that of the caryastan. The moonsiff further observed, that not a particle of reliable evidence had been adduced as to the alleged alteration of the boundaries, and still less that they were effected by the defendant; that on inspection there is not a trace of recent alterations. The plaintiff is unable to say what were the boundaries, and can only say that when the defendant's husband came into possession, the boundary was not what it now is. The moonsiff commented on the utter absurdity of the statement of plaintiff's 4th witness, that this channel, three yards in width at the widest part, took seven years to construct, and was finished just a year ago. The moonsiff observed, that the evidence as to the alteration of the eastern boundary was of the vaguest character, consisting solely of the statement of two witnesses obviously biassed in plaintiff's favor, that the boundary was one in another line but are unable to state by whom the alteration was made. The moonsiff dismissed the plaintiff's claim, directing both parties to bear their own costs.

4. In appeal the original plaintiff urges the following points:—

1st. Plaintiff's 2nd witness was not examined; that his 3rd witness only said that the signature to No. 3, was the Caryastan's and not that he saw him sign it; that the Caryastan had no authority to sign the receipt, and that the receipt of the patom was not entered in plaintiff's accounts.

2nd. With respect to the channel, appellant contends, that the alteration appears by the plan; that it is not correct, to say that 4th witness only has spoken to this alteration, for that the 3rd has also spoken to it; that the eight years would be occupied in the gradual performance of the work to deceive the owner; that from the moonsiff not asking the vakeel, all this was not explained before.

3rd. That the defendant is responsible for every thing, for although the former document was in her husband's name, the land was taken for her benefit.

4th. That the objections made to the Umshom adighary are without grounds and require no answer.

5th. That the moonsiff admits the right of a proprietor to resume whenever there is a difference, and that there are many decrees to that effect, that where there is fault on the tenant's part, the twelve years rule does not apply. (A list of this moonsiff's decrees to this effect is then given). That there is no objection to the resumption of the land when the money paid for the execution of the document is returned to the tenant.

*Judgment.*

5. I entertain no doubt whatever that the allegation of non-payment of patom for 1028, the 1st ground of asking the return of this land, is utterly false. The payment is proved by 1st defendant's witnesses as well as the granting of the receipt (No. 3) by plaintiff's agent, and the handwriting of which is reluctantly admitted by the plaintiff's witnesses exactly to resemble the writing of the Caryastan. As to this Caryastan not having authority to grant receipts, but merely to receive money, this is a private arrangement of plaintiff's own with which we have nothing to do. It is clearly shewn that the money was received by plaintiff's agent on account of the patom, and if there had been no receipt at all, and the evidence to the payment had been otherwise satisfactory, the absence of the receipt would have been of no consequence. If the receipt had not been the writing of the Caryastan, or if he had not received the money, nothing would have been easier than citing him as a witness to these facts.

6. As to the cutting of the channel, I am quite of the moonsiff's opinion that the evidence to the fact is utterly worthless. The 4th witness, a very steady swearer, pretends that he observed the progress of

the work for eight years, and it is attempted in appeal to shew that there is nothing incredible in this, but in my judgment it is utterly false, and the witness quite undeserving of credit. The same observation applies to the 3rd.

7. The evidence as to the alteration of the boundaries is of the vaguest character ; not a measurement is given to enable us to adjust the real boundaries, and we are required to conclude that the alteration has been made, because the present boundary line does not correspond with that of lands adjacent to it, and because two witnesses have chosen to swear that the line is not now where it was formerly. It is quite clear that no such inference can be drawn, and the fact of any alteration of boundary remains unproved ; the contrary appears far more probable. Still less is it established that the alterations were made after the execution of the renewed kanom deed in 1026. This was the commencement of a new contract, and it is not to be supposed for one moment that this transaction was completed without full precautions on the part of the plaintiff is amply furnished with agents. It is clear that the defendant is responsible solely for breaches of covenant subsequent to that date, for the pretence that she is liable for her husband's acts does not deserve a moment's notice. I deem it requisite to notice the doctrine asserted by the plaintiff in appeal, that there is no injustice in procuring the restoration of land on payment of the sum advanced by the tenant. I utterly repudiate this doctrine. No jenmkar can in less than twelve years demand the restoration of his land by a kanomkar, except in case of the breach of express or implied covenants by such kanomkar ; such a protection the custom of the country provides against the grasping avarice of proprietors, and it is only the strict preservation of this custom which can prevent this species of tenure from becoming a monstrous fraud, in which the weak will always be the prey of the strong.

8. As I am of opinion with the moonsiff, that no proof of violation of covenants by defendant has been established, it is unnecessary to consider whether the violations here alleged would have vitiated the contract for twelve years quiet enjoyment.

9. I dismiss this appeal, and confirm the decree of the lower court, all costs original and appeal will be paid by the plaintiff.

# DECREE OF THE SUBORDINATE COURT, ZILLAH CALICUT.

*Before the District Moonsiff of Cacherry, Original Suit No.* 161 *of* 1853.
*Before the Civil Court of Calicut, Appeal Suits Nos.* 405 *of* 1854 *and* 10 *of* 1855.

*Appeal Suit No.* 405 *of* 1854.

Poonmally Kristna Nair, Appellant.

*versus*

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|---|---|
| 1. Ambady Kovilagatha Vaba Tambooratty,............................. 2. Poollikat Shungara Menon,...... 3. Madakoony Kellon................. | Respondents. |

*Appeal Suit No.* 10 *of* 1855.

Madakoony Kellon, Appellant.

*versus*

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|---|---|
| 1. Ambady Kovilagatha Valia Tambooratty,............................. 2. Poollikat Shungara Menon,..... 3. Poonmally Kristna Nair......... | Respondents. |

This suit was brought to procure the return of a paramba alleged by the plaintiffs to have been granted on perpetual tenure to the 1st defendant subject to the payment of rupees 16 annually. Non-payment of patom is the ground of seeking the transfer of this land to the 2nd plaintiff, to whom the first had granted it on kanom. Non-payment of patom in 1027 (1851-2) and 1028 (1852-3) was alleged.

2. The 1st defendant answered, that he had acquired a right of Rupees 115 through the medium of those to whom, he (1st defendant) had passed it, that the 2nd defendant is answerable for the porapad due, but there is no ground for seeking the return of the land.

3. The 2nd answered that he had acquired a right of rupees 125, and that he had given patom in 1027 (1851-52), and that the reason of non-payment in 1028 (1852-53), was the refusal of the 1st plaintiff to receive it.

4. The moonsiff remarked, that the points for decision were, whether there was rent in arrear, and if so, whether such arrear furnished

ground for seeking the return of the land. He considered the admissions of the 1st defendant to necessitate a decree in the plaintiff's favor. This admission was in a deposition subsequently given, that the non-payment of patom constituted the revocation of a right of perpetual tenure. He considered the attempt to throw the burden of paying patom on the 2nd defendant as inadmissable, for if 2nd defendant was answerable, they should have settled the matter together. He therefore, on the pleadings, decreed the return of the land, and the payment of patom to 2nd plaintiff.

5. In appeal No. 10 of 1855, the 1st defendant prays for the reversal of this decree on the grounds.

1st. That a decree of return of this land, granted at a period beyond memory on perpetual tenure, of the grant recently renewed, is not warranted by law or the custom of the country.

2nd. That if the 2nd defendant has not paid the patom, the plaintiff has a right of action for that.

6. The 2nd defendant also appeals, under 405 of 1854, on the grounds :—

1st. That the only right which the plaintiff possesses is a right to sue for the balance of patom.

2nd. That on the occasion of the circar kist being imposed, an additional patom was consented to by 1st defendant's ancestors.

3rd. That until his own claims have been satisfied, no one has a right to the return of the land.

4th. That it is perfectly apparent from the record that the plaintiff and 1st defendant have colluded to defraud him.

5th. He can prove his case if called upon.

7. The appeal answer by 4th respondent in appeal suit No. 10 of 1855, supports the decree that the right given was not such as precluded resumption.

*Judgment.*

8. The moonsiff's decree has proceeded upon the fundamental misconception that the law of the land and the custom of the country can be determined upon the admission of a mere cooly, like the 1st defendant, contained in a deposition, subsequent to his pleading, that the plaintiff had no right to the return of the land. The defendant may unquestionably abandon, if he chooses, the advantage of a rule of law introduced for his own benefit, but it would require very strong proof that he had really done so, and this deposition, into the delivery of which he has beyond all doubt been cajoled or bullied, will not afford it. The right

of perpetual tenure is well understood, it is an absolute alienation of the land, subject to a perpetual obligation of paying the quit rent, but failure will certainly not justify the resumption of the land, as in cases of simple letting. Moreover, I am clearly of opinion that, according to the custom of the country, a demand and refusal of such patom should be alleged and proved, although for the determination of this case it is not necessary to decide the point. Any other doctrine will be productive of the most monstrous frauds, for there are daily cases of patom tendered to and refused by land-holders simply for the purpose of depriving the tenant of his rights. The case of a zemindar who at certain periods summons his tenants for payment of their dues, and whose right of distress only accrues upon their refusal or failure, should in my judgment rule the very similar cases in this province. Moreover, it seems never to have occurred to the moonsiff that even if the 1st defendant had abandoned his rights, he could not cede the rights of the 2nd defendant acquired before such abandonment, and from one who had then a clear independent title to convey them. Deeming it clear as a matter of law, that the plaintiff has no right to the return of this land, and that the 1st defendant has by no means abandoned the rights held by his family for so many generations, I reverse the decree of the lower court and dismiss the plaintiff's case, because the application made is utterly opposed to the customs of the country, which in this matter are the law of the land. The whole costs of every proceeding, original and appeal, will be discharged by the 1st plaintiff.

(True Copies.)

(Signed) H. D. COOK,
*Acting Civil Judge.*

## DECREE OF THE COURT OF SUDR UDALUT.

*Provincial Court for the Western Division, Original Suit No.* 149.

*Court of Sudr Udalut, No.* 28 *of* 1814.

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| Mooricolly Cheroo Umma, Oomchiree Amma, Amboo and Kelloo, Paupers.................... | Appellants. |

*versus*

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|---|---|
| Mooricolly Ramara Numbiar and Mooricolly Cannon.............................................. | Respondents. |

On the 5th Dhanoo 987 M. S. corresponding with the 20th December 1812, Mooricolly Maday Amma, Cheroo Amma, Oomchiree Amma, Amboo and Kelloo, instituted a suit in the provincial court for the western division, against Mooricolly Ramara Numbiar, and Mooricolly Cannon for the recovery of the sum of rupees 40,500, being the amount of their joint share of the family property as it stood at the time when the defendants commenced the management thereof, *viz.*, in the Malabar year 968. The provincial court, by decree dated the 9th June 1813, rejected the demand for a division of the family property as inconsistent with the law of maroomakatayam, by which, the management of the property is vested in the senior male of the family for the support and maintenance of the junior members thereof, but as the defendant Ramara Numbiar had avowed his incapacity to the management, and the other defendant Cannon had not shewn that attention which it was incumbent on him to shew to the other two branches of the family, the provincial court invested the plaintiffs Amboo and Kelloo with a joint share in the future management of the property with the defendant Cannon. The provincial court farther adjudged the plaintiffs to pay all costs.

From this decision, Mooricolly Cheroo Amma, Oomchiree Amma, Amboo and Kelloo appealed to the Court of Sudr Udalut by petition presented to the provincial court on the 23rd September 1814, the vakeel Narrain Sastry in the first instance, and on his resignation, the vakeel Ghoolam Rusool appeared for the appellants ; and the respondents having failed to appear, the court proceed to determine the appeal *ex-parte.*

The decision of the provincial court in this case being founded on the local usages of Malabar, of which no evidence was contained in the record, the court, on the 17th June 1817, required the provincial court to take and transmit to them such evidence as might enable them to decide whether the division of family property sued for be or be not consistent with such usages. The provincial court accordingly sent up

examinations taken by them of certain Namboories of cherikul, and the examinations of other Namboories taken by the judge in the Zillah of South Malabar.

An attentive consideration of these examinations has satisfied the court, that the judgment pronounced by the provincial court in this case is conformable with the local usages of Malabar.

The court accordingly confirming the decision of the provincial court, dismissed the appeal, and adjudged that the appellants do pay all costs.

Fees of the appellant's pleader, Ghoolam Russool, on Rs. 40,500, calculated according to Clause Second, Section VIII, regulation X of 1802, as follows:—

| | | | |
|---|---|---|---|
| On rupee 1,000 at 5 per cent................ | 50 0 0 | | |
| On do. 4,000 at 4 do. ................ | 160 0 0 | | |
| On do. 5,000 at 3 do. ................ | 150 0 0 | | |
| On do. 15,000 at 2 do. ................ | 300 0 0 | | |
| On do. 15,500 at 1 do. ................ | 155 0 0 | | |
| | | | 815 0 0 |
| Institution fee.................................... | 719 0 | | |

*Value of stampt paper filed by appellant, viz.*

| | | | |
|---|---|---|---|
| 1 Roll for Vakalutnamah. | 2 0 0 | | |
| 2 „ for appeal petition. | 4 0 0 | | |
| 1 „ for motion.......... | 2 0 0 | 8 0 0 | |
| | | | 727 8 0 |

Total rupees one thousand five hundred and forty-two, annas eight.......................... } rupees 1,542 8 0

But the said appellants having been admitted to plead in *formâ pauperis,* the amount of the said fees and costs is to be recovered from any property which he may hereafter be found to possess, under the provisions of the latter part of Section *III,* Regulation XIV of 1802.

THE 16TH JULY 1849.

PRESENT: W. A. MOREHEAD, Esq.,

No. 41 of 1846.

*Appeal from the decision passed by W. A. Forsyth, Esq., Civil Judge of Tellicherry, dated 18th March 1846.*

Chowacaren Orkattery Coonhy Ahmond, and seven others. } Appellants.

*versus*

Narasimmajee, Mookhtar of Teroovaddy Govingy, Dyarum of Bombay. } Respondents.

T. Ramachundriah, Vakeel for Appellant.

T. Appiah, Vakeel for Respondent.

1. The original suit was instituted by the respondent before the Civil Court of Tellicherry for the recovery from the defendants 2nd to 10th (appellant's) of the sum of rupees 4,022-4-0, being the amount of principal and interest alleged to be due upon a bond executed under date the 30th October 1841 by the 1st defendant and the late Chowakaren Bappen Cootty, who was the karnaven of the 2nd, 3rd, 4th, 5th, and 6th defendants, and the brother of the 7th, 8th, 9th, and 10th defendants.

2. The plaintiff also claimed interest up to the date of the execution of the decree.

3. The 1st defendant was included in the suit, on the ground that he had signed the bond as security for the abovementioned Chowacaren Bappen Cootty, with whom the plaintiff's master, who advanced the sum sued for was unacquainted.

4. The 2nd and 3rd defendants, who alone defended the suit, contended, that they could not be held responsible for the amount claimed; on the plea that there was reason to believe that the plaintiff and the 1st defendant had colluded; asserting that they could prove that their karnaven did not require the money, and that the 1st defendant had fraudulently appropriated all the valuable property, left by the deceased Bappen Cootty on his demise, which event took place at Bombay.

5. They also protested against paying the amount sued for, even if the bond were proved, on the ground that the debt had not been incurred for the benefit of the tarwaad.

6. The civil judge exonerated the 1st defendant, adjudging the remaining defendants to pay to the plaintiff the sum sued for, with costs,

together with additional interest up the date of the execution of the decree.

7. In his decree the civil judge observes, that the plaintiff, who was required to prove the execution of the bond, and the payment of the full amount to the deceased Bappen Cootty for his, deceased's, own use, cited three witnesses, of whom two were examined.

8. That of the two witnesses in question, one is the writer of the bond, and both attested it; that their evidence as regards the execution of it, as well as the reason for making the 1st defendant a party thereto, is clear, and in every respect satisfactory; that there does not appear to be any ground for suspecting that the transaction was a fraudulent one; the deceased as well as the 1st defendant having added notes to the effect, the former that he had received the money on his own account, and the latter, that it was paid to the former.

9. That there was no appearance of interpolation, and that the stamp was purchased the day previous to the execution of the bond; and that as the deceased was a native of Tellicherry, there was not, in the opinion of the civil court, any good ground for supposing that the money was not obtained for and appropriated by the deceased.

10. The civil judge observed that there could be no doubt as to the liability of the defendants 2nd to 10th, the Court of Sudr Udalut having ruled that it is not requisite for the head or other member of a tarwaad who may have the management of the property, to obtain the consent of all, or any of the other members to sign a bond, and that, as they took possession of the deceased's estate, they rendered themselves responsible for the debts he had incurred.

11. With respect to the plea that the 1st defendant had appropriated part of deceased's personal property, the civil judge remarked that they should have sued, and might still sue, to recover the value thereof.

12. From the above award eight of the defendants appeal.

13. In their appeal petition they contend, that the decree of the lower court has been passed contrary to the conditions of the bond, which, they observe, was jointly executed by the 1st defendant and the deceased Bappen Cootty, and that it has not been proved that the money, alleged to have been obtained, was either for the sole use of Bappen Cootty or for the use of the members of his tarwaad.

14. The respondent in his answer confines himself to the assertion that the decree of the civil court is correct; and that the liability of the defendants to pay the money due on the bond in question, which was executed by their deceased karnaven, does not admit of dispute.

15. The court of Sudr Udalut can find nothing in the record of

this case, which would induce them to question the correctness of the original decree.

16. That the bond upon which the suit was founded is a genuine document appears to the court to be fully proved; and the receipt signed by Bappen Cootty for the sum advanced, which is attached to the bond, is conclusive to the fact that the money was received by him on his own account.

17. It is also established that the money in question was procured by Bappen Cootty, to enable him to defray certain law charges in Bombay which he had incurred on account of the affairs of his tarward.

18. It is to be observed, that the appellants, who dispute their liability to discharge this debt, incurred by their acknowledged karnaven, have failed to adduce before the lower court any evidence to prove that Bappen Cootty, whilst in Bombay, was employed otherwise than in the transaction of the business of the tarwaad; or that the money advancedto him by the plaintiff was not required by him for the transaction of their family affairs in which he was then engaged.

19. For the foregoing reasons the court of Sudr Udalut affirm the original decree, with costs.

THE 1ST AUGUST 1855

*Present*: G. S. HOOPER, W. A. MOREHEAD, and T. L. STRANGE, Esqrs.

No. 25 of 1855.

*Special Appeal from the decision passed by H. Frere, Esquire, Civil Judge of Tellicherry, dated 7th January* 1854.

Oodia Vurma Rajah, Special Appellant.

*versus*

Commatta Kanier, and 5 others, Special Respondents.

1. The original suit was instituted by one Mettangotte Coonjoommel Coonjy Coongum Cherria Numbiar, against the defendants, for the recovery from them in virtue of a deed of sale executed to him in 1844 by the 2nd and 3rd defendants, the jenmkars of certain land, together with the arrears of rent on payment to the 1st defendant of the amount of his mortgage claim, rupees 370, and of the value of his improvement. The original claimant of the land transferred his claim to the 2nd plaintiff after the institution of the suit.

2. The 2nd and 3rd defendants, the jenmkars of the property, admitted the validity of the plaintiff's claim.

3. The 4th, 5th, and 6th defendants being included as supplemental defendants, the 4th defendant pleaded that in 1839, the 1st defendant's mortgage claim was redeemed and transferred to herself and her sister, (the 4th and 6th defendants), and that they had executed to the 5th defendant, (the husband of the 4th defendant), kanom and kay kanom deeds, under which he held the lands ; that in 1842 the 2nd and 3rd defendants (the jenmkars) executed to them (4th and 6th defendants) a second mortgage deed for rupees 420, in part satisfaction of the decree in original suit No. 154 of 1836, before the Tellicherry moonsiff, passed in favor of the 5th defendant, and that consequently the plaintiff could not recover possession of the land without having first paid the aggregate amount of both mortgages.

4. The 5th defendant supported the above plea.

5. The 6th defendant stated that the 5th defendant's claim was limited to the sum of rupees 135, for which he had been placed in possession of the lands under a transfer mortgage executed by the 4th and 6th defendants.

6. The moofty sudr ameen in his decree found the mortgage bond obtained by the 4th and 6th defendants, was a good and valid document,

and he held the bill of sale dated 1844, on which the suit was brought, to be consequently invalid, and therefore dismissed the plaintift's claim.

7. On appeal, the civil judge modified the decree of the moofty sudr ameen, by directing the plaintiff to be non-suited, with permission to institute a fresh suit in an amended form against the proper parties.

8. The court of Sudr Udalut admitted a special appeal, on the grounds, that the plaintiffs having been allowed to include the proper parties as supplemental defendants in the original suit, were afterwards entitled to obtain judgment on the merits of the claim, and were therefore improperly non-suited.

*Judgment.*

9. The court of Sudr Udalut are of opinion, that the civil judge erred in not recognizing the plaintiff's right to redeem the land. The contest in the case was simply as to the extent of mortgage held upon the land, and on this being determined, the plaintiff should have been declared at liberty to take possession on clearing off the same.

10. The court therefore decree that the land be made over to the plaintiff on his paying the 5th defendant the amount of the two mortgage deeds pleaded, namely, rupees 790, together with the value of improvements and houses, amounting to rupees 321-8-9. Total, rupees 1,111-8-9.

11. As the plaintiff brcught his suit, misrepresenting the sum of the incumbrances on the land, and thus necessitating a contest to his claims, the court of Sudr Udalut decree that the costs of the suit be paid by him. The court remit, however, the value of the primary stamp for the special appeal, as the special appeal was requisite to rectify the error of the civil judge.

THE 15TH AUGUST 1855.

*Present*: G. S. HOOPER, Esq., W. A. MOREHEAD, Esq.,

T. L. STRANGE, Esq.

No. 44 of 1855.

*Special Appeal from the decision passed by H. D. Cook, Esq., Subordinate Judge of Calicut, dated 10th June 1854.*

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| Arakulenny Moideen, *alias* Jenideen and Moochikel Abdoollah........................... | Special Appellants. |

*versus*

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|---|---|
| Kandantla Sree Koomareen Namboodry......... | Special Respondent. |

*Ex parte.*

1. The original suit was instituted by the plaintiff against the defendants to enforce the release of certain land mortgaged to the defendants on payment of the mortgage amount, and a further sum, the estimated value of the improvements made by the mortgagees, while in possession.

2. The defendants admitted that they held as mortgagees under the plaintiff, but pleaded that the improvements made by them were undervalued in the plaint, and that, by the usage of the country, the land mortgaged was not liable to be redeemed after a short incumbency by the mortgagees of four years only.

3. The district moonsiff decreed in favor of the plaintift, who, he considered, to be clearly competent to redeem the land at his pleasure. The value of improvements the moonsiff estimated by his ameen.

4. On appeal this decree was affirmed by the subordinate judge.

5. The court of Sudr Udalut admitted a special appeal from the decisions of the lower courts in order to determine the question of usage pleaded by the defendants.

*Judgment.*

6. The court of Sudr Udalut are of opinion, that the question of usage involved in this suit, has been improperly dealt with by the lower courts. It is not denied that it is the prevailing usage in the country of the parties to the suit that mortgages should run for a period of twelve years, before the expiration of which the mortgagee cannot be displaced. It is objected that proof is wanting that the mortgagee paid a fee for the renewal of the mortgage. It appears to the court that the deed having

been renewed, every necessary condition for renewal must be held to have been fulfilled.

7. The suit having been brought before the term established by usage for the continuance of the mortgage had expired, the court resolve, in reversal of the decrees of the lower courts, to dismiss it, with costs.

THE 30TH APRIL 1852.

*Present:* G. S. HOOPER, Esq., H. MORRIS, Esq.

*No* 38 *of* 1852.

*Special Appeal from the decision passed by Appaliah, Principal Sudr Ameen of Tellicherry, dated 26th August* 1851.

Anacaren Cherrea Moideen Cootty, Special Appellant.

*versus*

1st. Macatchy Coonjee Kalendar and seven others, Special Respondents.

M. Samoosastry, Vakeel for Special Appellant.

1. The original suit was instituted by four plaintiffs against the special appellant and four others, to prevent the sale of certain property attached under a decree in suit No. 302 of 1845, obtained by the 1st against the 2nd defendant; also for the cancellation of certain kanom claims advanced by the 1st and 4th defendants.

2. It was alleged in the plaint that the disputed property was acquired partly by plaintiffs, and partly by the karnaven; that 2nd defendant, being a dissolute character, had squandered away the greater part of the tarwaad property; and that the debts sued for in the above action were not contracted by that individual for the use of the tarwaad, which was consequently not liable for the claim.

3. The 1st defendant denied that 2nd defendant was a dissolute character, and maintained that he was the karnaven and managing member of the tarwaad, and that he had contracted the judgment debts, &c., for the use of the tarwaad.

4. The 2nd defendant failed to appear, and the 3rd defendant filed an answer admitting the plaint.

5. The 4th defendant asserted, that the 1st and 3rd plaintiffs and 2nd and 3rd defendants were alone entitled to the property, and that he possessed a kânom claim on a portion of it.

6. The district moonsiff considered it established that the disputed property belonged to the tarwaad, and that 2nd defendant's character, as stated in the plaint, was proved by the fact of his having squandered away the greater part of the said property, which, he was of opinion, could not be held liable for any portion of the claim either of the 1st or 4th defendants.

7. Dissatisfied with the moonsiff's judgment, the 1st defendant appealed, contending that plaintiffs might have prevented the dissipation of the tarwaad property; that not only had they not done so, but that they had recognized all the transactions hitherto entered into by that

individual; and that he, (appellant,) had proved by his witnesses, his enjoyment of the property made over to him on kanom.

8. The respondents in their answer adhered to their statement regarding 2nd defendant's dissipation of the tarwaad property, and alleged that they were unable to check him at the time, being minors; but that they have done so since they had attained their majority. They further stated that 2nd defendant had married appellant's sister, and had sons by her, to whom he had assigned portion of the tarwaad property, and certain bonds, without receiving any consideration for them.

9. The 4th defendant subsequently filed a motion admitting the justice of the moonsiff's decree.

10. The principal sudr ameen concurred with the moonsiff in considering that no proof had been adduced by 1st defendant to show that his judgment debt, and kanom claim, were contracted for the use of the tarwaad, and confirmed that officer's decision.

11. In the special appeal application it is urged that it was established by special appellant's witnesses, and admitted by the plaintiffs, that 2nd defendant was the karnaven, or managing member of the tarwaad, and that consequently that property was under the Hindoo law liable for his judgment debt; that his witnesses proved that the alienation of the said property was made by 2nd and 3rd defendants conjointly with 1st, 2nd, and 3rd plaintiffs, and that he requested the court of original jurisdiction to summon as witnesses the parties to whom the assignment of the property had been made, and to require them to produce their deeds bearing the signatures of those defendants and plaintiffs, but that the court refused to do so; that he, (the special appellant,) was denied the opportunity of cross-examining plaintiff's witnesses; that if plaintiffs objected to 2nd defendant's management of the tarwaad, it was their duty to institute a regular suit, paying stamp duty on the value of the whole tarwaad, against 2nd defendant and the parties to whom the alienation of the property had been made, to cancel all such transactions and for the removal of 2nd defendant; that on a former occasion, when 1st plaintiff with the view of evading a judgment debt advanced the same plea of 2nd defendant being a dissolute character, he was fined by the late auxiliary court of Tellicherry in the sum of rupees 25-0-0.

12. The court of Sudder Udalut are of opinion, that sufficient grounds have been shown to justify the admission of a special appeal in this case.

13. It is admitted on all hands that the 2nd defendant was the karnaven or managing member of the tarwaad in question, The lower

courts have, however, decided that the property belonging to the tarwaad cannot be held liable for the satisfaction of the decree in favor of the 1st defendant, (special appellant,) on the ground that the 2nd defendant, against whom the said decree was passed, had squandered the property for his own use, and that the debt was not contracted for the use or benefit of the tarwaad.

14. But it was pleaded by the 1st defendant that the property was alienated by the 2nd and 3rd defendants conjointly with the 1st, 2nd, and 3rd plaintiffs, and it appears that the district moonsiff refused to summon and examine as witnesses the parties to whom, as he alleges, such assignments of property had been made, and to require them to produce their deeds bearing the signatures of the said defendants and plaintiffs.

15. It has been on more than one occasion ruled by this court, conformably to Hindoo law and local usage, that the property belonging to a tarwaad is answerable for debts contracted by the karnaven, or managing member, unless it can be clearly and satisfactorily proved that they were not contracted for the benefit of the tarwaad.

16. Also, that the formal consent or signature of the other members of the family is not necessary to render a bond or other document executed by the said karnaven valid and binding on them, if a *bonâ fide* transaction, done with their knowledge or consent, or for their behoof.

17. Had the 1st defendant succeeded in establishing the point above referred to, it would have gone far to overthrow the allegation of he plaintiffs, that the estate was squandered by the 2nd defendant without their knowledge or consent.

18. The court therefore resolve to remand this suit to the court of original jurisdiction, with an injunction to receive evidence from the 1st defendant, special appellant, on the point in question, and to pass judgment *de novo*.

(True copies.)

C. F. CHAMIER,

*Deputy Register.*

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